DOCKET FILE COPY ORIGINAL

AUG - 3 1998

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Forbearance from Applying Provisions of the	)	
Communications Act to Wireless	)	**WT Docket No. 98-100**
Telecommunications Carriers	)	

COMMENTS OF UTC

Pursuant to Section 1.415 of the Commission's Rules, UTC, The Telecommunications Association,[1] hereby respectfully submits the following comments on the FCC's *Notice of Proposed Rulemaking, (NPRM)*, FCC 98-134, released July 2, 1998, in the above-captioned matter regarding forbearance or elimination of unnecessary and obsolete wireless regulations.

I. Introduction

UTC is the national representative on telecommunications matters for the nation's electric, gas and water utilities, and natural gas pipelines. Over 1,100 such entities are members of UTC, ranging in size from large combination electric and gas utilities serving several million customers to small rural electric cooperatives and water districts. All utilities and pipelines rely on telecommunications systems, including in many instances private point-to-point microwave networks, in order to meet their public service obligations. Increasingly, utilities and pipelines are being approached by telecommunications carriers, including wireless providers, to utilize their private microwave networks as carrier's carriers or as a means of interconnecting wireless cell sites. Unfortunately, an anachronistic rule, Section 101.603(b)(1), prohibits private

[1] UTC was formerly known as the Utilities Telecommunications Council.

No. of Copies rec'd 0+9
List ABCDE

microwave systems from carrying common carrier traffic.[2] UTC seeks to have this prohibition modified as part of this proceeding.

II. The FCC Should Amend Its Private Microwave License Rule To Facilitate Competition

The FCC has instituted the current *NPRM* as part of its effort to identify additional areas of wireless regulation where it should exercise its forbearance authority pursuant to Section 10 of the Telecommunications Act of 1996. Section 10 provides the Commission with authority to forbear from the application of virtually any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or a class of carriers or services. In addition, this proceeding is part of the FCC's 1998 biennial review of regulations pursuant to Section 11 of the Act. Section 11 requires the FCC to review all of its regulations applicable to providers of telecommunications services and determine whether any rule is no longer in the public interest as the result of meaningful economic competition between providers of telecommunications service.

As part of its review of wireless regulations in this proceeding, UTC urges the FCC to consider amending its rules governing private microwave sharing so as to allow private microwave licensees to act as carrier's carriers. Such an amendment would further the goals of the Telecommunications Act by fostering facilities-based competition, and eliminating unnecessary or obsolete regulations, with absolutely no countervailing negative impact on consumers.

[2] 47 C.F.R § 101.603(b)(1).

Section 10 and Section 11 of the Act are aimed at removing unnecessary regulations and promoting competition through the use of market forces.[3] Elimination of the prohibition on private carrier's carrier activity will accomplish these twin goals and directly benefit telecommunications providers and consumers. Such action is consistent with the FCC's stated "commitment to forbear from enforcing provisions of our rules that inhibit or distort competition in the marketplace, represent unnecessary regulatory costs, or stand as obstacles to lower prices, greater service options, and higher quality services for American telecommunications consumers."[4]

Many of UTC's member companies with private microwave systems have been approached by personal communications service (PCS) licensees, cellular carriers, specialized mobile radio (SMR) licensees, rural telephone companies, and others about the possibility of leasing reserve capacity on the licensees' private microwave systems. In many cases, the microwave licensees are leasing antenna tower space to these carriers or commercial mobile radio service (CMRS) providers, and would be willing to provide microwave capacity, on a private carrier basis, to these carriers for their cellsite interconnect. In one situation, a rural telephone company sought to extend additional service into a very remote part of its operating area where the local utility currently operates a private microwave system. However, under the current rules, a private microwave licensee can enter such an arrangement with a carrier only if it is willing to relicense its microwave system as "common carrier" and take on the trappings and responsibilities of a microwave common carrier. This is because Part 101.135 allows private microwave licensees to share their network capacity on a private carrier basis provided that they

[3] While the FCC's forbearance authority under Section 10 is generally limited to regulations governing telecommunications carriers UTC would urge the FCC not be to be constrained by such an overly narrow interpretation of its authority with regard to UTC's request because the rule modification it seeks would directly benefit telecommunications carriers.

are not carrying any common carrier traffic.

Faced with the choice of relicensing their systems and exposing themselves to common carrier regulations or foregoing the opportunity to provide capacity to carriers, many private micorwave licensees choose not to provide capacity. Thus, the continued application of the prohibition on private microwave licensees acting as private carrier's carriers is at best an unnecessary regulatory burden or at worst an impediment to competition.

Prior to consolidation of Rule Parts 21 and 94 into a new Part 101 in WT Docket No. 94-148, as well as the consolidation of most microwave frequency bands above 3 GHz in ET Docket No. 92-9, the rules imposed significant regulatory distinctions between "common carrier" and "private" microwave facilities. Each type of system was generally restricted to certain frequency bands or channels; private users were limited to sharing capacity with other eligible private users for the transmission of non-common carrier traffic; and common carrier facilities could not be used for non-common carrier purposes.

Most microwave bands were consolidated in the *Second Report and Order* in ET Docket No. 92-9,[5] and the prohibition on use of common carrier transmitters for non-common carrier purposes was eliminated in the *Report and Order* in WT Docket No. 94-148.[6] However, the Commission declined the opportunity to eliminate the remaining restriction on sharing of private microwave capacity, even as it stated that it was "open" to revisiting the issue if anyone expressed interested in further pursuing it.

UTC attempted to take the Commission up on its offer to "revisit" this issue by filing a "petition for reconsideration" on June 27, 1996, to eliminate this anachronistic prohibition on the intermingling of common carrier and private microwave traffic on the same microwave facilities.

---

[4] *NPRM.*, para. 2.

[5] *Second Report and Order* in ET Docket No. 92-9, 8 FCC Rcd 6495 (1993).

Yet, despite nearly two years since the pleading cycle on the UTC petition, thus far there has been no action by the Commission.[7] While UTC remains hopeful that the Commission will act on the pending petition, it nevertheless believes that it is appropriate to consider this issue in this forum because of the negative effect that the existing rule has on competition.

UTC understands that there may be reluctance to completely eliminate the permissible use restrictions between private and common carrier microwave systems, or to adopt a "predominant use" test for determining whether a given system should be licensed as private or common carrier. UTC believes, however, that a limited amendment of Section 101.135 of the Rules would allow this type of spectrum-conserving. pro-competitive sharing while still retaining the traditional distinctions between private and common carrier microwave systems. The following is a suggested amendment (new language is underlined; deleted language is ~~interlined~~):

> **§101.135. Shared use of radio stations and the offering of private carrier services.**
>
> Licensees of Private Operational Fixed Point-to-Point Microwave radio stations may share the use of their facilities on a non-profit basis or may offer service on a for-profit private carrier basis, subject to the following conditions and limitations:
>
> (a) Persons or governmental entities licensed to operate radio systems on any of the private radio frequencies set out in §101.101 may share such systems with, or provide private carrier service to, any person eligible for licensing under this part, regardless of individual eligibility restrictions, provided that the communications being carried are permissible under ~~§101.603~~ §§101.603(a) and 101.603(b)(2) - (3). . . .

This amendment would parallel the change effected through Section 101.133 which permits transmitters licensed for common carrier services to be concurrently used for non-common carrier communications purposes. It is significant to note that in eliminating the

---

[6] *Report and Order* in WT Docket No. 94-148, 11 FCC Rcd 13449 (1996).

[7] Public Notice of the UTC petition was published in the Federal Register on July 24, 1996, 61 Fed Reg. 38448.

prohibition on the use of common carrier facilities that had appeared in Part 21, the Commission saw no inherent problem in allowing private and common carrier traffic to be transmitted on the same facilities, and indeed, found such sharing to be in the public interest:

> *39. Discussion. We are eliminating the restriction that prohibits the use of transmitters used in common carrier stations from being used for non-common carrier purposes. Licensees who operate common carrier stations will be able to provide private services at the same location without having to construct duplicative facilities. This action will promote economic efficiencies by reducing construction and operating costs associated with operating separate facilities. Further, this is consistent with our recent action of eliminating a similar restriction in Part 22 of the rules.*[8]

This amendment also would conform the use of private microwave systems to the current regulatory scheme for non-microwave communications technologies. For example, an entity owning private fiber optic communications facilities or satellite transponder capacity may share or lease that capacity, on a private carrier basis, to any entity, including common carriers, without becoming a communications common carrier.

Enforcement of the current regulation, which restricts common carriers to leasing microwave capacity only from other common carriers, is inconsistent with Section 10 of the Communications Act, 47 U.S.C. §160, since (1) it is "not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) it is "not necessary for the protection of consumers;" and (3) elimination of this restriction is "consistent with the public interest" since it will conserve spectrum, lead to more timely initiation of service, and minimize environmental and economic impacts of constructing redundant communications paths. For all of these reasons, elimination of the requirement will promote competition among telecommunications carriers, and is therefore

presumptively in the public interest under Section 10(b).

Elimination of this restriction would also be consistent with the Commission's biennial review of regulations, conducted pursuant to Section 11 of the Communications Act. The restriction on carrier leasing of private microwave capacity "is no longer necessary in the public interest as the result of meaningful economic competition between providers of such services." 47 U.S.C. §161(a)(2). Entities wishing to provide telecommunications services have various options available, including the licensing of their own common carrier microwave systems on the same frequencies available to private system users. Thus, there is no justifiable reason to prevent common carriers from leasing microwave capacity on private microwave systems.

III. Conclusion

UTC believes that significant relief can be afforded that will conserve spectrum and promote the deregulatory and pro-competitive policies of the Telecommunications Act, while maintaining the traditional distinctions between private and common carrier microwave systems. For all of the foregoing reasons, UTC requests that the Commission move promptly to eliminate the anachronistic restriction on the sharing of private microwave capacity with entities proposing to use the shared capacity to relay common carrier traffic.

---

[8] *Report and Order*, Wt Docket No. 94-148, 11 FCC Rcd at 13466 (1996).

WHEREFORE, THE PREMISES CONSIDERED, UTC urges the Commission to take action on this *Notice of Proposed Rule Making* in accordance with the views expressed in these comments.

Respectfully submitted,

UTC

By: _____
Jeffrey L. Sheldon
General Counsel

By: _____
Sean A. Stokes
Associate General Counsel

UTC, The Telecommunications
Association
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036
(202) 872-0030

August 3, 1998